

# **Western Express**

**SERVICE COMPANY**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

May 14, 1992

To Whom It May Concern,

Please find enclosed comments regarding S. 1462.

Thank you for your consideration.

Sincerely,

  
Kelly Knievel  
President

KK/mh

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Less than a decade ago there was a near hysterical chorus to overregulate and/or ban out of existence one of the major marketing devices of the present and future. In 1978, H.R. 9505 was introduced to effectively ban commercial speech by phone. In 23 states, 54 similar bills (and 50 other forms) were modeled after H.R. 9505. Then nothing significant happened! Why?

Essentially there were two reasons. First, the detractors had no "social" case in the terms of representing even a large segment of public opinion. Second, they had no legal case.

For the "cause people" to raise an issue successfully they need the media to hype interest which must in turn be translated into people willing to be counted. Initially, as you might remember, the media was vocal. However, the newspapers lost their concern with "junk calls" when they realized how many of their subscriptions were generated by phone. Broadcast media followed the print media and stopped hitting the issue.

Without the hype, an issue must really have substance in the public psyche. The FCC began a formal investigation of rulemaking citing "widespread public concern."<sup>34</sup> The FCC eventually dropped all efforts to regulate this form of speech.<sup>35</sup> The FTC ended its inquiry two months earlier.

Certain states acted. The main thrust was to ban automatic dialing devices.<sup>36</sup> Other states incorporated telephone sales into their Home Solicitation Sales Laws.<sup>37</sup> Each year a general potpourri of bills is introduced in the state legislatures. Even less compelling than the lack of public demand for these laws is the lack of legal basis.

There are four areas that were argued by those who do not wish telephone marketers well.

- Telephone solicitations are not "protected" speech.
- Telephone solicitations invade the listener's privacy.
- The tactics employed are "high-pressure."
- There are less intrusive alternatives.

We'll briefly review each of these areas both in reflection and because the issue may arise again, examining the lack of sufficient legal grounds in each case.

### Commercial Speech

The Supreme Court first encountered the issue of determining the first amendment status of commercial speech in 1942.<sup>38</sup> The court considered commercial speech to be outside the zone of First Amendment protection, though the court failed to address a constitutional distinguishment between commercial and private speech or, for that matter, even define "commercial speech." This opinion was later characterized by Justice Douglas as "casual, almost offhand."<sup>39</sup>

Commercial speech protection began to emerge in *New York Times Co. v. Sullivan*,<sup>40</sup> where the court distinguished between commercial speech and editorial advertising. The content of the advertising was found to convey more than a commercial purpose. Because the advertisement contained information of the "highest public interest and concern," it was constitutionally protected.<sup>41</sup>

Twelve years later came a decision which was squarely based on the principle that the free flow of information in the commercial sector is as much a part of First Amendment values as the robust and open debate of political issues.<sup>42</sup> In fact, the court went so far as to state the "particular consumer's interest in the free flow of commercial information. . . may be as keen if not keener by far, than his interest in the day's most urgent political debate."<sup>43</sup> This statement, while criticized by some, is patently obvious. A lot more people may remember a Lite Beer commercial than a news brief or even the name of their local assemblyman. More obvious (and seasonal), a lot more people actively shopped in the December Christmas season than voted in the November election.

However, the strongest endorsement from the court came in the following quote (emphasis my own):

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. . .* And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

This last point is important as to the content issue. If commercial information were outside the protection of the First Amendment, the "consumer advocate" as well as the commercial speaker would be left unprotected. Ralph Nader and *Consumer Reports* magazine are two speakers whose message deserves (and receives) constitutional protection.

True, there are differences in the state's ability to regulate private and commercial speech. This is because the latter is more than mere content, but content leading to a sale. The states retain the right to protect their citizens as to content which would mislead an individual into a contract. Most cases will turn on whether a regulation on commercial speech is based on the information function or the contractual function of the message.

The test most useful was articulated by the Supreme Court in *U.S. v. O'Brien*, a case involving a private citizen's burning his draft card. Here was a case in which speech and non-speech elements were combined in the same course of conduct. O'Brien lost. The test employed by the court was as follows:

(a) government regulation is sufficiently justified if it . . . furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

As part of "contractual regulation" government may regulate false or deceptive advertising. This is not a regulation of an advertiser's message content but of the fact the advertiser did not make do on the contract as promised *subsequent* to the content dissemination. Likewise, the state may compel affirmative disclosure where a deception might arise from incomplete disclosure. Finally, corrective advertising might be ordered not as a regulation of content but as a remedy for inducing a contract by deceptive means. Yes, there is such a thing as a wrong product claim. As the court noted:

There is no First Amendment Rule. . . requiring a state to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of spurious communication."

However, the existence of varied forms of truth-in-advertising regulation should be considered to result in commercial speech as a "secondary" speech. Commercial speech claims are more verifiable and add to a contractual relationship. They are more than mere "opinion." When it goes beyond mere opinion, private speech is not without its own standards. As stated in *Geriz*, false statements of fact do not enjoy constitutional protection for their own sake. There is no constitutional value in false "statements of fact," "many "fighting words," or yelling "Fire!" in a crowded theatre.

When any regulation goes beyond the contractual aspects of the commercial speech it will be analyzed under general First Amendment principles. This is important to all direct marketers in defending overbroad regulations on lists in the legislatures and inevitably in the courts.

Privacy is being argued on emotional terms in the legislatures. Privacy is a statutory right—not a constitutional one — and as such is entitled to less protection than First Amendment rights such as commercial free speech.

The Supreme Court did invent a form of constitutional "right of privacy" in an access to contraceptives case<sup>43</sup> without a majority agreeing on the constitutional text on which to base this new right. A plurality discovered "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Others found such "right" in the Ninth Amendment and others in the Fourteenth Amendment's "due process clause" (even though the text and history make it plain that only procedural not substantive rights were intended by this clause). Mr. Justice Stewart asked in dissent (and went unanswered): "What provision of the Constitution, then, does make this state law invalid?"

In a hierarchy of constitutional values the court invented right of privacy is not sufficiently grounded in the Constitution to survive a head-on test with commercial free speech in a constitution adjudication. The court will find that calls are content, and as such may be proscribed only if the speech actually infringes on another, is illegal, is untruthful or leads to uninformed acquiescence.<sup>44</sup> Telephone calls do none of the above and even if they did, there are less restrictive alternatives to further an individual's interest. "Infringement" or "uninformed acquiescence" are already protected by narrow regulations such as cooling-off periods. Illegality and untruthfulness are content issues, so they can be dealt with through in-place truth-in-advertising regulations.

The Constitution guarantees only the right to speak—not the right to force others to listen. The opponents of telephone marketing argued that they were forced to listen and such forced listening invaded the individual's right to be left alone.

If the telephone was such an intrusion, 99.9% of Americans wouldn't have them (many have two, three, or four). They are not there for outgoing calls only. The telephone seller's medium is the telephone wire. He calls you with the honest intent to make a sale. No firm is investing in his salary, support staff and, yes, phone bill with the intent to try to sell you a product you don't want at 3 a.m. after 11 rings of the phone.

Each call is costly. The calling firm has probably screened you carefully as a potential sale. The calling firm does not want to antagonize you so they probably have in-house guidelines similar to the Direct Marketing Association's "Suggested Guidelines for Marketing by Telephone." Calling late or early with too many rings will not produce a receptive buyer. The lack of business acumen of the critics is apparent here. Few sellers are making blind, cold calls to harass. If even one firm is, the market realities are that it will soon be out of business.

Sure, the phone ringing is a "disturbance," but such a "disturbance" disappears when the caller is providing me with a service I want. Move to a house and within days you have the option of various oil contracts—comparison of price, service contracts, and the like. It saves time and money. The cable company calls offering a discount which isn't available if you call them, etc., etc. Only a showing that a substantial privacy interest was being invaded in an intolerable manner would qualify as a substantial state interest justifying protection through regulation.<sup>45</sup> None exists to regulate legitimate telephone marketing channels.

The mask comes off the "privacy people" when they exclude in their legislation the charities, politicians, etc. Such distinctions are an attempt to distinguish the good guys from the bad. The latter are usually profitable enterprises.

If there really is a privacy issue in the phone's ringing, then treat all equally. But as was apparent, this regulatory effort was in essence a political issue—not a privacy issue. "Privacy" is now raised against all in the direct marketing technologies. There is a consistent bias against science, marketing, and, of course, profit, by opponents of lists, interactive cable, telephone, etc.

High-pressure tactics can be an issue in the door-to door salesperson "confrontation" (and a growing one in telephone—see below). They're polished at their craft. Almost all are honest, but as good salespeople they believe in and are enthusiastic about their product. Their infectious enthusiasm can be catching. Further, you are a bit intimidated and after their presentation is complete, you don't want to appear "rude" by asking him or her to physically leave your premises. We have a cooling-off period for this form of sale.<sup>10</sup> This is a rational response to a "problem" of certain sensibilities.

The telephone is impersonal. You don't see the other person. There is no physical "presence." You are not a captive audience that cannot avoid the alleged "objectional" speech. Because you don't know the stranger on the other end of the phone, the added anonymity makes it easier to end the conversation without the guilt feelings one might otherwise have after asking a physically present salesperson to leave.

A click of the receiver and the person is gone. If a state wishes to entertain adopting a cooling-off period for its people, it has the option.<sup>11</sup> However, this exercise of a state's police power presupposes a rational need compelling such action. Overregulating or imposing unjustifiable burdens on commercial free speech to placate a vocal few with inordinate sensibilities is not a rational exercise of power.

### Less Intrusive Alternatives

The ability to frame the question is often the ability to frame the answer. You'll often see the above "intrusion" argument. You are then caught defending an "intrusion" rather than talking up your service or convenience.

This argument again evidences an anti-business bias and lack of comprehension of marketing. As you know, your customers aren't interchangeable by media. Telephone may reach certain people better than mail or vice versa. Both mail and telephone may be better than TV.

Further, the uninformed "business is rich" attitude again surfaces. Most firms *don't* have a realistic access to TV. Telephone technology is decreasing in cost while other forms of access are increasing. Therefore, the marketing reality is that

- many customers whom you wouldn't otherwise have access to respond to the telephone, and
- telephone marketing may be the most financially feasible targeted marketing for the small firm or individual entrepreneur.

The home solicitation laws (see Section IV) were designed to head off the salesperson at your door. They were "Dagwood Bumstead" laws—designed to protect the unwary from high pressure sales. Rather than reenact Dagwood's brawls at the door, stairs, or in his tub, all you have to do is hang up the phone. These laws pertaining to telephone marketing make little sense when viewed in light of the original legislative intent. The laws were enacted to prevent overbearing salespersons from being able to successfully accomplish their stereotyped sales by intimidation.

The reasoning was that customers succumbed to sales persuasion because of intimidation or a lack of desire to hurt the feelings of another human being they just encountered in their living room and spent time with.

All such reasoning would fail if the nature of telephone marketing was understood. Intimidation ends with the click of the phone. An impersonal voice is much more easily dismissed than an individual you've met in person, albeit briefly.

## Conclusion

Government should have two priorities with regard to commercial speech: (1) to prohibit deceptive messages to consumers and (2) to do what it can to facilitate the maximum flow of truthful speech to consumers so that they can make realistic choices as to their needs.

The mere speculation of harm (the best that can be said of the critics' position) is not a compelling governmental interest justifying regulation. Telephone marketing assists society in achieving the second objective listed above. If a few dishonest or poorly managed firms enter the field, they'll be made short work of by the fine and desired firms. Your consistent customer purchasing volume is the purest form of democratic choice. And the consumer knows he or she can simply hang up the phone.

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## Why Punish the Good Guys?

Everywhere you turn, officials are caught up in a headlong rush to "get those guys" . . . businesses using the telephone to defraud customers.

And that is great. There is no one who wants to see illegitimate operators removed from the scene more than those businesses who are conducting business in an ethical and proper manner. Except perhaps those individuals and firms who have actually been defrauded.

The problem comes in the methodology used to curtail the activities of these unscrupulous con artists. Too many of the proposals entail attacking the entire group of businesses utilizing the medium.

Legislative and regulatory officials can hardly speak of telephone sales and marketing support without it being in the context of "telemarketing fraud".

So much so, that in many minds the two words are practically synonymous. Ergo, if you're doing business via the telephone, you are by definition out to defraud people. If you are defrauding people, the chances are that you're doing it via the telephone.

What fuels this fire is both carelessness and ignorance within the general media, within the halls of legislation and within the organizations of regulation:

For example, let's look at Volume 90, Issue 44 of the FTC News Notes, dated August 7, 1989 . . .

The lead article is highlighted, **FTC'S CONSUMER PROTECTION DIRECTOR TESTIFIES ON DECEPTIVE FUND-RAISING BY CHARITIES**. The article describes

the biggest problem area as "sweepstakes" giveaway promotions, yet the entire field of direct mail is not singled out for abuse. Okay so far.

Contrast that with this highlight from the same issue, **FTC CHARGED TWO FLORIDA TELEMARKETERS WITH MISREPRESENTING THEIR WATER PURIFIERS**. Not "two Florida businesses", or "two Florida marketers". Why is the medium used to perpetrate the fraud as important as the fraud itself?

Which brings us to another point . . .

Most of the "anti-fraud" legislation being drafted is well-meaning, but misguided. Instead of attacking the problem of fraud (for which there are laws in place that punish perpetrators), they have a tendency to end up as regulatory measures.

How about simply giving the FTC enough budget and manpower to combat the problem, as it is already empowered?

For example, let's examine the "Telemarketing Fraud Prevention Act" (HR1354) currently before the House of Representatives. The predominance of the issues dealt with in this piece of proposed legislation are regulatory in nature . . . concerning hours of operation, style of presentation delivery, how speedily ordered merchandise must be delivered, etc . . . not directed at criminal activity. And the areas that do relate to prosecution (read "prevention") award extraordinary powers to state attorneys general in the pursuit of telemarketing fraud artists. Not fraudulent businesses in general, but only those that use the telephone.

The "good guys" are being tarred with the same brush as the "bad guys".

There is only one thing that will stem this tide of ill-advised prejudice, and that is greater public awareness of what marketing and sales via telephone can be, how reputable companies are utilizing the medium and how it is of benefit to the general populace.

And the only ones who can do this successfully are the honest practitioners like yourselves, people and businesses who can stand up and say, "We use the telephone in the course of our business, and we use it responsibly. Do not continue to lump us in with the dishonest businesses."

Just as not every used car dealer is dishonest, and not every insurance agent is obnoxious, not every business employing the telephone as a sales and marketing tool is guilty of attempting to defraud the public.

It is time for each of us to communicate our devotion to honest business practices to our representation in Washington and our respective state legislatures. And to protest being lumped together with those companies whose ethics are less than ideal.

It is our right as American citizens to be considered innocent of any wrongdoing until proven guilty . . . on a case-by-case basis.

Let's get to work on some action that will help safeguard the buying public . . . both consumer and business . . . from fraudulent operators. But let's do it without condemning an entire class of business. ☛

## WARREN, P. J.

Plaintiff brought this declaratory judgment action challenging the constitutionality of ORS 759.290. He appeals from a summary judgment for defendants. We reverse.

Plaintiff is a chimney sweep who uses a "telemarketing computer" to advertise his service. The computer automatically and systematically dials telephone numbers in plaintiff's service area. When it connects with someone who answers "hello," it plays a recorded message concerning plaintiff's business. ORS 759.290 provides:

"(1) No person shall use an automatic dialing and announcing device to solicit the purchase of any realty, goods or services.

"(2) Subsection (1) of this section does not apply to:

"(a) The solicitation for funds by charitable or political organizations or institutions.

"(b) Contacts between persons with an existing business relationship.

"(3) As used in this section:

"(a) 'Automatic dialing and announcing device' means equipment that dials programmed telephone numbers and plays a recorded message when the call is answered.

"(b) 'Existing business relationship' means a preexisting and continuing course of dealing between parties involving the purchase or sale of realty, goods or services."

Plaintiff's use of the telemarketing computer falls squarely within the proscription of that statute and is not saved by either of the exceptions.

Plaintiff's principal challenge to ORS 759.290 is that it violates Article I, section 8, of the Oregon Constitution,<sup>1</sup> because it is an impermissible content-based restriction on speech. Specifically, he contends that, because the law only prohibits the use of automatic telemarketing devices for "commercial" solicitations, it impermissibly discriminates

<sup>1</sup> Article I, section 8, of the Oregon Constitution provides:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

against speech on a particular subject. To support his argument, plaintiff relies on *Ackerley Communications, Inc. v. Mult. Co.*, 72 Or App 617, 623, 696 P2d 1140 (1985), *rev dismissed* 303 Or 165, 734 P2d 885 (1987), where we held:

"An ordinance that imposes a regulation on one kind of nonabusive speech and no regulation on others, because of the difference in their content, is inconsistent with Article I, section 8." (Footnote omitted.)

In that case, we struck down an ordinance that banned commercial, but not noncommercial, outdoor advertising, because the state has "no constitutionally acceptable interest in regulating commercial and noncommercial expression differently because of the content." 72 Or App at 625.

The regulation challenged in *Ackerley*, placed a time, place and manner restriction on commercial speech that it did not place on noncommercial speech. So, too, does ORS 759.290. Accordingly, defendants concede that, if *Ackerley* is still the law, the statute must fall. However, defendants contend that *Ackerley* was implicitly overruled by subsequent decisions from the Oregon Supreme Court.

Defendants first rely on *City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988), where the court considered whether a city ordinance that regulated the location of stores that sold sexually oriented, and in some cases obscene, materials violated Article I, section 8. The defendant merchants argued that the regulation was an impermissible content-based time, place and manner restriction. The court apparently agreed, because it rejected the city's argument that the ordinance was "concerned with the 'effect' of speech, not the speech itself." 306 Or at 184.

In concluding that the ordinance was unconstitutional, the court clarified the process for analyzing laws challenged as violating Article I, section 8. The court first set out the general rule that section 8

"forbids the enactment of a law directed in terms against any subject of speech, writing, or printing that cannot be shown to fall within an old or modern version of a well-established historical exception that the constitutional guarantees demonstrably were not meant to displace." 306 Or at 179. (Emphasis supplied.)

The court then emphasized that a time, place and manner restriction that focuses on the undesired effects of speech, if it is within the legislature's power to proscribe such effects, is not a law directed "in terms against any subject of speech." 306 Or at 191; *see also In re Fadeley*, 310 Or 548, 559, 802 P2d 31 (1990). Because the ordinance focused on the content of the materials purveyed, not on the effects of the purveyance, it failed that test.

*Tidyman* is a straightforward application of the simple rule that, unless the subject matter of a law falls within an historical exception, a content based restriction on speech is impermissible in Oregon. Only content-neutral time, place and manner regulations that focus on prohibitable effects of speech are permitted. However, the opinion contains some possibly inconsistent language:

"This court has never held that an otherwise valid restriction must cover all or nothing, for instance that a city may not make evenhanded exceptions to an otherwise valid restriction against placing signs on utility poles, obstructing traffic for a civil rights commemoration, or using sound-trucks during a political campaign without having to make the same equally available to supporters of sports teams or to commercial advertisers." 306 Or at 183.

Defendants cite that passage as support for the proposition that commercial speech is entitled to less protection under Article I, section 8, than other "higher" forms of speech, such as political speech. That is how the U.S. Supreme Court views the scope of free speech protections under the First Amendment to the United States Constitution. *Ohralik v. Ohio State Bar Assn.*, 436 US 447, 98 S Ct 1912, 56 L Ed 2d 444 (1978). We do not read *Tidyman* to effect such a diminution in the protection afforded by Article I, section 8.

The quoted portion of *Tidyman* appears in a discussion distinguishing regulations of general applicability that incidentally restrict the exercise of a constitutional right from those that are specifically designed to curb the deleterious effects of the exercise of such rights. The analysis is based on the presumption that there will be an "otherwise valid restriction," i.e., a restriction that does not offend the general

rule against content-based regulations or any other constitutional guarantees. Those regulations, if applied in a non-discriminatory manner, would not necessarily implicate Article I, section 8, because they would not be aimed at suppressing expressive activities. Nevertheless, the court explained that the state can grant exemptions from such laws to promote protected activities, provided that the exemptions are made in an even handed manner.

In that context, the quoted material merely explains that, if an exception from a valid regulation of general applicability is granted for a political demonstration, the state need not, as a matter of course, grant the same exception to a sports promoter. All that is required is equality of access to, or general applicability of, the exception. We read no more into the language than that. In sum, the analysis does not apply when a law is "flatly directed against one disfavored type of pictorial or verbal communication." 306 Or at 184.

*Tidyman* specifically eschewed any analytical approach that focuses on the "value" of the speech at issue. We view the court's refusal to engage in ranking and balancing as a rejection of that approach. It said:

"By omitting the supposed adverse effects as an element in the regulatory standard, the ordinance appears to consider the 'nuisance' to be the characteristics of the 'adult' materials rather than secondary characteristics and anticipated effects of the store. Such lawmaking is what Article I, section 8, forbids." 306 Or at 186.

Finding no support for defendants' position in *Tidyman*, we turn to *City of Hillsboro v. Purcell*, 306 Or 547, 761 P2d 510 (1988), where the court addressed whether a "Green River" anti-solicitation ordinance is constitutional under Article I, section 8. The precise ordinance at issue prohibited

"the practice of persons going in and upon private property or calling at residences \* \* \* not having been requested or invited so to do \* \* \* for the purpose of soliciting orders for the sale of goods, wares, merchandise and/or for the purpose of disposing of and/or peddling or hawking the same \* \* \*." 306 Or at 550.

Relying on our decision in *Ackerley Communications, Inc. v. Mult. Co.*, *supra*, we held that ordinance invalid because it

prohibited only commercial speech. *City of Hillsboro v. Purcell*, 87 Or App 649, 652, 743 P2d 1119 (1987). However, the Oregon Supreme Court construed it to prohibit all solicitation, not just commercial solicitation.<sup>2</sup> The court then invalidated the ordinance on overbreadth grounds. 306 Or at 556.

In concluding that the ordinance was overbroad, the court said:

"The ordinance is overbroad, not because it regulates solicitation for one purpose differently from another, but because it prohibits all solicitation for any purpose at any time. The ordinance as written is broad enough to preclude any person or group from approaching a door in a residential neighborhood to solicit financial support for any purpose *through the sale of merchandise*. This is far more than a regulation limited to and contained by the consequences the law seeks to prevent." 306 Or at 556. (Footnote omitted; emphasis supplied.)

Defendants read that to mean that the ordinance was overbroad, only because it prohibited religious and political solicitation in addition to commercial solicitation. We disagree with that. Instead, we view *Purcell* as an application of the *Tidyman* rule in the context of an overbreadth challenge.

A law is unconstitutional if it proscribes a constitutionally protected activity. *State v. Robertson*, 293 Or 402, 410, 649 P2d 569 (1982). All speech is constitutionally protected, unless it is an historically excepted form. 293 Or at 412. Nonetheless, a law can protect against the harmful effects of permitted speech, *City of Portland v. Tidyman*, *supra*, and it will withstand constitutional scrutiny, unless it sweeps too broadly in its attempt to eliminate those effects. In short, a law implicating the rights protected by Article I, section 8, is unconstitutional if it specifically prohibits protected speech or if it burdens expression but is not "limited to and contained by the consequences" that it seeks to prevent. The latter was the defect in the "Green River" ordinance.

Because the ordinance did "not by its terms prohibit speech \* \* \* [i]t [was] not unlawful as an outright prohibition

<sup>2</sup> Defendants assert that the rejection of our analysis was an implicit rejection of our rule in *Ackerley*. We disagree. Because the court found that the ordinance did not discriminate on the basis of content, it merely found that our analysis was not applicable.

on speech." 306 Or at 556. Nevertheless, it sought to control an effect of speech, i.e., fraud by unscrupulous and unethical solicitors. Because it burdened more expression than was necessary to control that effect, it was held to be overbroad.<sup>3</sup> Accordingly, we find no merit in defendants' contention that *City of Hillsboro v. Purcell*, *supra*, represents a departure from the court's admonition:

"There is no basis under the Oregon Constitution to provide more protection to certain nonabusive communication based upon the content of the communication. Speech related to political issues or matters of 'public concern' is constitutionally equal to speech concerning one's employment or neighbors, so long as that speech is not an abuse of the right." *Bank of Oregon v. Independent News*, 298 Or 434, 439, 693 P2d 35 (1985).

In our view, neither *Tidyman* nor *Purcell* conflicts with our decision in *Ackerley Communications, Inc. v. Mult. Co.*, *supra*, that different subjects of speech are not subject to different levels of protection under Article I, section 8. See also *Bank of Oregon v. Independent News*, *supra*. Because ORS 759.290 regulates commercial speech differently from other subjects of speech, it is unconstitutional.

Reversed.

<sup>3</sup> In *Northwest Advancement v. Bureau of Labor*, 98 Or App 133, 772 P2d 943, *rev den* 308 Or 315 (1989), we upheld regulations restricting the use of minors in door-to-door solicitation, because those regulations were limited to the effect of speech that the wage and hour laws seek to prevent.